

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

R & R METAL FABRICATORS, INC. : CIVIL ACTION
:
v. :
:
GENERAL ELECTRIC COMPANY : NO. 96-7083

MEMORANDUM AND ORDER

Presently before this Court is Defendant's Motion to Transfer pursuant to 28 U.S.C. § 1406, or in the alternative, pursuant to 28 U.S.C. § 1404(a). For the reasons which follow Defendant's Motion to Transfer to the Western Judicial District of Pennsylvania is granted.

FACTS¹

This is a diversity action for breach of contract. Plaintiff is a New Jersey Corporation with a principal place of business in New Jersey. Defendant is a New York Corporation with a principal place of business in Connecticut. GE Transportation Systems, a division of General Electric, maintains offices in Erie, PA, in the Western Judicial District of Pennsylvania.

From 1988 to 1994, Plaintiff manufactured and sold pressure tanks to Defendant, pursuant to a series of purchase orders. During this time approximately 5000 tanks were delivered to the Defendant.

On March 15, 1993, Defendant issued a new written discrepancy procedure report for vendor, which assessed a \$300

1. The facts are taken from Plaintiff's Complaint and Defendant's Answer.

charge on any defective item returned to the vendor for replacement or repair. In November 1994, Defendant ordered 400 tanks, but payment was not received within 10 days, which Plaintiff alleges violated an oral agreement between the parties.

In August 1995, Plaintiff wrote to Defendant stating that it would not build or ship any more tanks to Defendant until Defendant paid the money that was owed to the Plaintiff. In September 1995, Defendant canceled four separate purchase orders. Plaintiff alleges that no reason was given.

Plaintiff filed a complaint on October 18, 1996 in the Eastern District of Pennsylvania. On February 27, 1997, Defendant filed an answer with a counterclaim and affirmative defenses, including improper venue, pursuant to 28 U.S.C. § 1391. On April 16, 1997, Defendant filed a Motion to Transfer to the Western District of Pennsylvania pursuant to 28 U.S.C. § 1406, or in the alternative, pursuant to 28 U.S.C. § 1404(a).

DISCUSSION

Venue is not proper in the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1391. The relevant parts of the venue statute provide that a civil action based solely on diversity of citizenship may be brought only in:

- (1) a judicial district where any defendant resides . . .
- (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . or

(3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391.

For the purposes of venue, if a state has more than one judicial district, a corporation is deemed to reside in any district in that state "within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state." 28 U.S.C. § 1391(c).

In the instant case, the Defendants do not reside in the Eastern District of Pennsylvania. Plaintiffs contend they chose this District as an accommodation to the Defendant. See Plaintiff's Memorandum in Support of Response to Defendant's Motion to Transfer, at 2.

But Defendants do not have the "continuous and substantial" contacts with this forum necessary to show that venue is proper in this District. The fact that the Defendants flew into Philadelphia International Airport to meet with the Plaintiffs in Camden, New Jersey, does not give the Eastern District jurisdiction over this action. See Plaintiffs' Response at 2.

The events or omissions that gave rise to the claim did not take place within this District. The omission that gave rise to the breach of contract claim in this case was Defendant's alleged failure to pay for goods. This omission can best be described as having taken place in the Western District of

Pennsylvania, rather than the Eastern District. Since the omission that gave rise to the claim occurred in the Western District of Pennsylvania, this action could have been properly commenced there.²

A defense of improper venue "is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment *thereof permitted by Rule 15(a) to be made as a matter of course." Fed.R.Civ.P. 12(h).

Even though it has been some time since the filing of the complaint, Defendants properly raised their objection to venue in their answer and in a subsequent motion, thus protecting it from waiver. See, Fed.R.Civ.P. 12(h)(1); Defendants' Answer at paragraph 3.

I find that this action was improperly brought in the Eastern District of Pennsylvania, that it could have been properly brought in the Western District of Pennsylvania and that Defendants have not waived their right to object.

An appropriate order follows.

2. Plaintiffs request in their Response that, if venue is to be transferred, it be transferred to the District of New Jersey. While this action may have been commenced in the District of New Jersey originally, "[t]he plaintiff, by bringing the suit in a district other than that authorized by the statute, relinquished his right to object to the venue." Cain v. DeDonatis, 683 F.Supp. 510 (E.D.Pa. 1988).

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O R D E R

AND NOW, this 14th day of August, 1997, upon
consideration of the Defendants' Motion to Transfer pursuant to
28 U.S.C. § 1406, or in the alternative, pursuant to 28 U.S.C. §
1404(a), and Plaintiffs' Response thereto, it is hereby ORDERED
that Defendants' Motion to Transfer is GRANTED. The Clerk is
directed to transfer the above-captioned matter to the Western
District of Pennsylvania.

BY THE COURT:

M. FAITH ANGELL
UNITED STATES MAGISTRATE JUDGE